Filed 8/20/12 P. v. Booten CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. TIMOTHY BOOTEN, Defendant and Appellant.	B230046 (Los Angeles County Super. Ct. No. TA110547)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kelvin D. Filer, Judge. Affirmed.

Christopher C. Hawthorne for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Steven D. Matthews and Timothy M. Weiner, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Timothy Booten appeals from a judgment following his conviction for possession of marijuana for sale. He contends the trial court erred in denying his pretrial motion to traverse and quash a search warrant because there was no probable cause to support the warrant. In addition, he contends there was insufficient evidence to support his conviction. Finding no error, we affirm.

STATEMENT OF THE CASE

On February 23, 2010, the Los Angeles District Attorney filed an information charging appellant and two co-defendants, Travell Baldwin and Deontra Phillips, with possession of marijuana for sale (Health & Saf. Code, § 11359). The information further alleged that defendants committed the offense for the benefit of, at the direction of and in association with a criminal street gang (Pen. Code, § 186.22, subd. (b)(1)(A)).[1] It was also alleged that appellant had a prior serious or violent felony conviction (§§ 667, subds. (b)-(i)/1170.12, subds. (a)-(d)).

On October 5, 2010, defense counsel filed a notice of motion and motion to traverse and quash the search warrant issued on January 10, 2010, and to suppress evidence seized during the execution of the warrant. Appellant contended that the search warrant was issued without probable cause, and that the good faith exception to the exclusionary rule was inapplicable because a reasonable and well-trained officer would have known the affidavit was so facially deficient that the officer would not have had a good faith belief in its sufficiency. He sought to suppress the following evidence: (1) 189.74 grams of a substance identified as suspected marijuana, which was recovered from inside a fireplace; (2) nine clear

[1] All further statutory citations are to the Penal Code, unless otherwise stated.

plastic baggies containing a substance resembling marijuana (26.85 grams total), recovered from the kitchen counter; (3) 19 clear plastic bindles containing a substance resembling marijuana (22.63 grams total), recovered from the kitchen counter, as well as "[a]ny and all other evidence seized from the home where the arrest occurred, as a result of the search warrant executed on January 22, 2010." In support of his motion, appellant attached declarations by Clarence Andres and Andre Jones that they did not purchase marijuana from anyone at 617 West 105th Street.

On November 5, 2010, appellant filed a supplemental motion to traverse and quash the search warrant and suppress evidence. In this supplemental motion, appellant contended he possessed a reasonable expectation of privacy in the area searched and the items seized. In support of his supplemental motion, he attached a declaration by Jerome Noah Robinson, who stated that he was the lessee of the premises at 617 West 105th Street and that he had given appellant permission to enter and use the premises and had provided appellant with a key. The trial court heard and denied the motion November 12, 2010.

A jury convicted appellant of possession of marijuana for sale. The jury also found true that the crime was committed for the benefit of a criminal street gang. In a separate bench trial, the trial court found true that appellant had suffered one prior serious or violent felony conviction.

The court sentenced appellant to nine years in state prison, consisting of the upper term of three years, doubled pursuant to sections 667, subdivisions (b) through (i) and 1170.12, subdivisions (a) through (d), plus a consecutive term of three years on the gang enhancement. On January 5, 2011, appellant filed a timely notice of appeal.

STATEMENT OF THE FACTS

On January 13, 2010, Los Angeles Police Officer Owen Berger requested a warrant to search a house located at 617 West 105th Street for marijuana and narcotics paraphernalia, including scales and containers. In his affidavit in support of a search warrant, Officer Berger stated there was probable cause to search the house based upon the following facts:

"On November 16th, 2009, I received information from Detective . . . Zambri about an anonymous tip Southeast Station received regarding the residence at 617 West 105th Street. The tip stated there was heavy traffic in and out of the residence, especially at night, for what seemed to be narcotics activity. The tip also stated the house was equipped with Closed-Circuit Television (CCTV[)] Cameras[.]

"On November 20th, 2009, at approximately 1330 hours, my partner, Detective Heller, and I, from an observation point, were able to monitor the activities at the front door of 617 West 105th Street for approximately 30 minutes. I observed several individuals drive up to the curb in front of the location, exit their vehicle, then walk to the rear of the location through the driveway. Approximately 30-60 seconds later, the individuals would exit the location and walk to their car, leaving quickly, driving east or west from the location." Officer Berger opined that this conduct was consistent with narcotics sales.

He further stated:

"On the same day, at approximately 1630 hours, my partner and I observed a burgundy Plymouth Aurora . . . enter the driveway of the location and park. Without anybody exiting the Aurora, an unknown male Black exited the front of the location and walked to the vehicle[,] then appeared to lean into the driver's side window. Approximately one minute later, the Aurora backed out of the driveway

and headed southbound. . . . My partner and I communicated with a nearby unit . . . who followed the Aurora [until] the Aurora parked . . . . Officer Marr and Officer Stauffer then approached the vehicle to question the occupants. Upon approach, Officer Marr observed that the passenger (Grant, Jermaine) of the Aurora was holding a clear green plastic baggie containing marijuana in his right hand, and 'rolling paper' (cigarette paper) in his left hand. After asking the two occupants of the vehicle to step out, Officer Stauffer spoke with the driver (Jones, Andre) and asked him if he had any marijuana, to which Jones replied, 'Yeah, in my pocket.' Officer Stauffer recovered a green plastic baggie containing marijuana from Jone[s]'s left front pants pocket. . . . Both Jones and Grant were cited for [possession of marijuana and released].

"Later, on November 23rd, 2009, at approximately 1630 hours, my partner Detective Stack . . . and I were again observing the residence at 617 West 105th Street when we observed an unknown male Black (later identified as Jamar Robinson and hereafter referred to as Robinson) exit the front door of the location carrying a large box. Robinson entered a red Mercedes and drove away from the location, at which time we observed the rear left brake light of the Mercedes was not working. We communicated our observations to another unit . . . , who conducted a traffic stop on the Mercedes. . . . Officer Mroczkowski . . . approached the passenger side of the vehicle and smelled the odor of marijuana coming from inside the vehicle. The driver (Robinson) and passenger (later identified as Kelvin Percy and hereafter referred to as Percy) were both[] asked to exit the vehicle. Officer Timmermans . . . found and retrieved a red pill bottle containing marijuana and "rolling paper" in Percy's left front pants pocket. Percy was cited [for possession of marijuana and released]. . . . Robinson was found to live at the residence at 617 W 105th St during the traffic stop.

"Later, on 01/06/10 at approximately 1540 hours, my partner Officer Marr . . . and I were observing the residence at 617 W 105th Street with a clear view of the front driveway. We observed one male Black (later identified as Andres, Clarence) park his light blue/silver Nissan hatchback on the north side of 105th St just east of the location. Andres exited his vehicle and walked down the driveway of the location to the rear. Andres returned from the rear to the location approximately 30 seconds later. Andres then entered his vehicle . . . and drove away westbound. My partner and I formed the opinion that [Andres] was involved in narcotics activity, and communicated our observations and description of the vehicle to another unit . . . . Detective Zambri and Foreman followed the vehicle from the location to where it stopped . . . . Detective Foreman observed Andres park his vehicle in a red tow-away zone, then exit[ed] his vehicle. As Detective Forman was passing Andres'[s] illegally parked vehicle, he observed two small plastic baggies containing a green leafy substance resembling marijuana in plain view in a cupholder in the center console of the Andres[] vehicle. The detectives then followed Andres into a liquor store and observed him buy[ing] some items. Upon exiting the liquor store, Detectives Foreman and Zambri detained the defendant. While asking Andres about his illegally parked car and asking if [they] could search the vehicle, Andres spontaneously stated to Detective Foreman that he had some "weed" in the car, and that he smoke[d] marijuana. I arrived on scene where Detective Foreman showed me the evidence, which I collected from the center console of the Nissan, and later booked it as evidence at Southeast Station. Andres was cited [and released].

"Due to the activities and observations described above, I have formed the expert opinion that the above described location, 617 West 105th Street is being used to store and sell marijuana."

At appellant's trial, Officers Berger, Kevin Marr, Thorsten Timmermans, and Patrick Foreman testified about the surveillance. Their testimony was consistent with Officer Berger's statements in his affidavit in support of the search warrant. Officer Berger testified he did not know who provided the tip that led to the police surveillance. He also explained that there was a time gap in the surveillance because other investigations took priority.

The search warrant was signed by a judge on January 13, 2010, but police officers did not execute the warrant until January 22, 2010. Prior to executing the search warrant, the police conducted another surveillance of the house. Los Angeles Police Officer Pete Cabral testified that on January 22, 2010, he conducted the surveillance and relayed his observations to Officer Berger contemporaneously. At around 4:35 p.m., Officer Cabral observed three individuals, including co-defendants Baldwin and Phillips, drive to the residence and enter the residence. Appellant opened the door to let them in. Over the next 25 minutes, Officer Cabral observed that individuals would arrive at the residence, and that appellant, Baldwin,or Phillips would open the door and look east and west before letting the individual into the house. Police officers did not detain any of these individuals after they left the house due to lack of resources and because the officers were afraid that they would notify the suspects in the residence. Instead, the officers executed the search warrant on the house. Officer Cabral was not part of the team that executed the search warrant.

Detective Foreman testified he was the first officer to enter the house during the execution of the search warrant. When Detective Foreman came to the hallway of the house, he saw appellant and ordered him to get on the ground, but appellant fled into the living room. The detective chased after appellant and saw him throwing items into the fireplace.

After appellant was detained, Officer Marr extinguished the fire in the fireplace and recovered baggies of marijuana and a digital scale. Officer Marr testified that the police detained appellant, Baldwin, Phillips, and another individual during the search. Officer Marr searched Baldwin and Phillips, recovering cash in various denominations from their persons. He did not recall whether he searched appellant, but if he did, he found nothing on appellant's person.

Los Angeles Police Detective Timothy Stack testified he was part of the team that executed the warrant. He testified that appellant was the only suspect detained in the living room, as the other three suspects were detained in the southeast bedroom. Detective Stack testified that he saw plastic baggies and plastic bindles containing a leafy substance resembling marijuana on the kitchen counter. He booked the items into evidence. They consisted of nine baggies weighing a total of 26.85 grams, 19 plastic bindles weighing 22.63 grams, and several larger bindles weighing 10.28 grams. In the southeast bedroom, Officer Stack recovered live ammunition and some additional marijuana. Officer Stack testified that the baggies recovered from the fireplace weighed a total of 189.74 grams. He also testified that he recovered appellant's cell phone and some marijuana as well as empty plastic baggies and a "Swisher Sweets" box from the table in the living room. He recovered cash in various denominations in the living room and kitchen counter. He did not find any rolling paper or cigarette paper in the house.

It was stipulated that 150.6 grams of marijuana were recovered from the plastic baggies seized in the living room, and the 19 plastic bindles recovered in the kitchen contained 19.46 grams of marijuana. Police also found and seized a

.45-caliber handgun and a .22-caliber rifle in the northeast bedroom, but no drugs were found in that room.

After being presented with a hypothetical that mirrored the facts in this case, Detective Foreman opined that the marijuana seized in the house was possessed for sale. Los Angeles Police Officer Warner Carias, a gang expert, opined that the possession of marijuana for sale was committed for the benefit of a criminal street gang.

Jerome Robinson testified he gave appellant a key to 617 West 105th Street. Appellant also was allowed in and given access to the living room and the kitchen. Robinson testified he did not give anybody else keys to the house during the time appellant was there, although his son, Jamar Robinson, and his mother also had keys to the house. He also testified he had installed the security cameras.

Appellant did not testify. He called as witnesses three of the individuals who had been stopped by the police during the surveillance and cited for possession of marijuana. Jones testified and denied buying marijuana from anyone at the house on West 105th Street. He claimed he had purchased the marijuana the night before in Inglewood. Similarly, Percy denied buying marijuana at the house on West 105th Street from appellant or Jamar Robinson. He claimed he had purchased the marijuana in Compton several days earlier. Likewise, Andres testified he had driven to the house on West 105th Street to "pick up [his] C.D.'s." He did not purchase marijuana while at the house.

Baldwin and Phillips also testified at appellant's trial. Baldwin testified that on January 22, 2010, he had stopped by the house on West 105th Street to "smoke weed" and "chill." When the police arrived at the house, he was in the living room. When he was arrested, he had money on him from prior drug sales.

Baldwin admitted he had sold marijuana from the house on previous occasions. He also testified that although he was in a gang, he did not give the proceeds from his drug sales to his gang, but instead kept it for himself and his two children. Baldwin testified that his brother, Deontra Phillips, also sold marijuana from the house.

Baldwin testified that appellant did not assist him in selling marijuana. According to Baldwin, appellant was "sometimes" present during drug sales, but was usually at the house only to "smoke and chill." On cross-examination, Baldwin admitted he did not have a key to the house on West 105th Street, and that it was appellant who let him and his brother into the house. Baldwin admitted the house was known as a "drug house."

Phillips testified that he was a gang member and that he had sold drugs from the house on West 105th Street on "numerous occasions." He stated he kept all of the money he made from selling marijuana because he had three children and no other job. Phillips claimed he got a key to the house from Jerome Robinson, although on prior occasions, somebody would let him into the house through the back door. On January 22, 2010, he brought plastic baggies in two Swisher Sweets boxes to the house.

Phillips stated he did not recall appellant ever selling drugs from the house. On cross-examination, Phillips admitted that the house was a "known location for marijuana sales," that "somebody [was] selling from that location pretty much every day," that the only people who sold drugs from the house were members of Phillips's gang, that appellant was a member of the same gang, and that appellant was present on multiple occasions when drugs were being sold from the house.

DISCUSSION

Appellant contends (1) the trial court erred in denying his motion to traverse or quash the search warrant, and (2) there was insufficient evidence to support his conviction. We address each contention in turn.

1. *Motion to Traverse or Quash Search Warrant*

Appellant contends the trial court should have granted his motion to quash or traverse the search warrant and suppress evidence because "some of the information [in the affidavit] was stale, some of it was irrelevant, and in the aggregate, it provided no probable cause to search the house in question." Specifically, he contends (1) that the tip was unreliable as it came from an anonymous informant, (2) that the "inexplicabl[e]" delay in the surveillance rendered the information gleaned during the November surveillances stale at the time the warrant was signed, (3) that there was no linkage or nexus between the marijuana found on the drivers or passengers of the three detained vehicles and the house because "the affidavit never states where these people obtained the marijuana, in particular whether they had bought it at 617 West 105th Street," and (4) that the informant's tip was not corroborated because the officers did not conduct an investigations showing "there was heavy foot traffic at the house, particularly at night." We disagree that there was a lack of probable cause.

"In reviewing a search conducted pursuant to a warrant, an appellate court inquires 'whether the magistrate had a substantial basis for concluding a fair probability existed that a search would uncover wrongdoing.' [Citation.] 'The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him [or her], including the "veracity" and "basis of knowledge" of persons supplying

hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.' [Citation.] The magistrate's determination of probable cause is entitled to deferential review. [Citation.]" (*People v. Carrington* (2009) 47 Cal.4th 145, 161.)

Preliminarily, we note that the fact that a tip was from an anonymous informant does not automatically invalidate a search warrant. Rather, such a tip may lead to the establishment of probable cause if it is "'corroborated in essential respects by other facts, sources or circumstances.'" (*People v. Maestas* (1988) 204 Cal.App.3d 1208, 1220.) We agree that the tip here required substantial police investigation to corroborate and conclude the police investigation was sufficient to corroborate the tip. Police officers conducted surveillance of the house on three different occasions over a period of weeks prior to seeking a search warrant. On each occasion, the officers observed conduct characteristic of narcotics sales. Upon detaining the suspected buyers within minutes of their presence at the house, the officers found marijuana. Thus, the officers sufficiently corroborated the tip that narcotics activity was occurring at the house on 617 West 105th Street.

We reject appellant's suggestion that the information in the warrant application was stale. "If circumstances would justify a person of ordinary prudence to conclude that an activity had continued to the present time, then the passage of time will not render the information stale." (*People v. Hulland* (2003) 110 Cal.App.4th 1646, 1652.) Here, the observations made by the surveilling officers in late 2009 were replicated in the surveillance of early 2010. Far from being stale, the information gleaned from the November surveillance was updated and corroborated by the January surveillance. The officers' observations over a period of weeks justified the conclusion that there were ongoing narcotics sales at the house.

The fact that the officers did not elect to ask the suspected buyers whether they had purchased the marijuana from the West 105th Street house is not dispositive. The fact that each of the cars stopped after visiting the house contained marijuana, along with other observed indicia of narcotics sales, raised a reasonable inference that the house was a source of narcotics sales. Moreover, officers were not required to ask a question that might have caused those found with marijuana to alert the occupants of the house.

Finally, the fact that the officers did not corroborate the existence of "heavy foot traffic . . . at night" as specified in the tip, is irrelevant. The officers did more than merely confirm basic information in the tip. They independently observed transactions that suggested narcotics sales and confirmed that certain individuals who participated in the transactions possessed marijuana. (Cf. *Bailey v. Superior Court* (1992) 11 Cal.App.4th 1107, 1112 [no probable cause for search warrant where in corroborating information of narcotics sales from an anonymous tipster and a citizen informant, the police investigation merely confirmed that defendant lived at the address].)

Indeed, the observations of the court in *People v. Kershaw* (1983) 147 Cal.App.3d 750 (*Kersaw*) are equally applicable here: "In the case at bar, the personal observations and facts gathered by the officers come very close to showing, if they do not in fact show, probable cause to search defendant's residence for narcotics. In this situation it may be more accurate to say that the informer's statement corroborated the police investigation rather than the other way around." (*Id*. at pp. 754-755 [anonymous tip].) Appellant contends that the tip in *Kershaw* was more detailed and that the surveillance in *Kersaw* was much longer than the surveillance in this case. Neither factor, however, is dispositive. Rather, the question is whether there is "'a substantial basis for concluding a fair

probability existed that a search would uncover wrongdoing.'" On this record, we conclude there was substantial evidence in the affidavit for a reasonable magistrate to conclude that a fair probability existed that narcotics would be located at the house on 617 West 105th Street. Thus, there was probable cause to issue the search warrant.

In any event, even if the search warrant was invalid, the evidence discovered during the search need not be suppressed because the police officers acted in good faith in relying on the search warrant. In *United States v. Leon* (1984) 468 U.S. 897, the United States Supreme Court held that suppression of evidence discovered during a search pursuant to a subsequently invalidated search warrant "is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause." (*Id*. at p. 926.) Here, there is no evidence that Officer Berger or his fellow officers were dishonest or reckless. Indeed, prior to executing the search warrant, the officers conducted another surveillance of the house on 617 West 105th Street to confirm that narcotics sales were still occurring. In addition, it was objectively reasonable for a well-trained officer to conclude, based upon the prior surveillance, that marijuana and narcotics paraphernalia would be found on the premises. Accordingly, the trial court did not err in denying appellant's motion to traverse or quash the search warrant and suppress the evidence discovered during the search.

2. *Sufficiency of the Evidence*

Appellant contends the evidence was insufficient to sustain his conviction as "[n]o witness saw [appellant] sell, exchange, transport, or exercise control over any illegal substance, except for Detective Foreman, who saw him trying to dispose of

marijuana in the fireplace." Appellant contends the prosecution failed to show he possessed marijuana, as the evidence showed he "was not the owner of the house, was not a tenant, and did not have exclusive access to the house, which would have given him the right to exclude others." Finally, appellant contends there was no evidence that he had the intent to sell marijuana. We disagree.

"'The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]'" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) The elements of possession of marijuana for sale are: (1) actual or constructive possession of marijuana in an amount sufficient to be used for sale; (2) knowledge of its presence and illegal character; and (3) the specific intent to sell it. (*People v. Montero* (2007) 155 Cal.App.4th 1170, 1175.) "Intent to sell may be established by circumstantial evidence. [Citation.]" (*People v. Harris* (2000) 83 Cal.App.4th 371, 374.)

Here, the record was sufficient for a rational jury to find appellant guilty beyond a reasonable doubt. First, Detective Foreman saw appellant throw baggies of marijuana into the fireplace. It was undisputed that those baggies contained 150.6 grams of marijuana. In addition, appellant had the key to the house, and the house contained large amounts of marijuana and narcotics paraphernalia. On this record, a reasonable jury could find that appellant had actual and constructive possession of marijuana in an amount sufficient for sale.

Appellant contends the evidence was insufficient to show he possessed the marijuana found in the house because (1) he did not have exclusive control over

the premises, and (2) he handled the marijuana only momentarily to dispose of it. We disagree.

At the time of the arrest, the only persons who might have keys to the premises were appellant and Phillips. Jerome Robinson testified that he did not give Phillips a key to the house. Phillips testified that he got a key from Jerome. The jury was free to believe Robinson's testimony and discredit Phillips's. In addition, the possession element of appellant's crime may be satisfied by joint possession. (*People v. Montero*, *supra,* 155 Cal.App.4th at p. 1175.)

Furthermore, the factual circumstances in this case do not support appellant's contention that he handled the marijuana only momentarily and solely for the purpose of disposing of it. In *People v. Mijares* (1971) 6 Cal.3d 415 (*Mijares*), the California Supreme Court held that under limited circumstances, "momentary handling [of narcotics] prior to abandonment" is insufficient to constitute possession of the narcotic. (*Id*. at p. 423.) The court held that the trial court was required to give the jury an instruction on momentary possession where the defendant asserted that he was trying to revive his friend when he found some heroin on him, which he immediately grabbed and threw away. (*Id*. at pp. 419 & 423.) The court cautioned that its decision "in no way insulates from prosecution under the narcotics laws those individuals who, fearing they are about to be apprehended, remove contraband from their immediate possession." (*Id*. at p. 422.) Here, the record shows that appellant ran from Detective Foreman into the living room where he proceeded to attempt to destroy incriminating evidence. The record does not suggest that appellant happened to come upon some marijuana in the living room and impulsively grabbed it and threw it away.

There was also sufficient evidence to support the jury's finding that appellant knew of the presence and illegal character of the marijuana in the house.

Appellant was found in the living room, in close proximity to drugs and drug paraphernalia that were in plain sight. Additionally, the jury was permitted to infer from appellant's flight from Detective Foreman and from his efforts to destroy the marijuana and a digital scale that appellant was aware of the presence and nature of the marijuana and his own guilt. (*People v. Rogers* (2009) 46 Cal.4th 1136, 1170.)

Finally, there was sufficient evidence to support the finding that appellant intended to sell the marijuana found at the house at 617 West 105th Street. It is undisputed that the house was a site of marijuana sales. Based upon Officer Cabral's observations, marijuana sales occurred on the date the search warrant was executed. Appellant was present during numerous prior drug sales, and on the date of the search, his cell phone was found on the table in the living room. In addition, Officer Foreman, testifying as an expert witness, opined that the marijuana was possessed for purposes of sale. (*People v. Harris*, *supra*, 83 Cal.App.4th at pp. 374-375 ["'In cases involving possession of marijuana or [methamphetamine], experienced officers may give their opinion that the narcotics are held for purposes of sale based upon such matters as the quantity, packaging and normal use of an individual; on the basis of such testimony convictions of possession for purpose of sale have been upheld. [Citations.]' [Citation.]"].) Accordingly, we conclude that on this record, a rational trier of fact could find appellant guilty of possession of marijuana for sale.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, J.

We concur:

WILLHITE, Acting P. J.

SUZUKAWA, J.